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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Implementation of Sections 309(j) and )  
337 of the Communications Act of 1934 )  
as Amended )

WT Docket No. 99-87

Promotion of Spectrum Efficient )  
Technologies on Certain Part 90 )  
Frequencies )

RM-9332

Establishment of Public Service Radio )  
Pool in the Private Mobile )  
Frequencies Below 800 MHZ )

RM-9405

To: The Commission

**COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS**

The Association of American Railroads ("AAR"), by its undersigned counsel, pursuant to Section 1.415 of the rules of the Federal Communications Commission ("Commission"),<sup>1</sup> and the Order released May 19, 1999,<sup>2</sup> hereby submits its comments in response to the above captioned Notice of Proposed Rule Making.<sup>3</sup>

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<sup>1</sup> See 47 C.F.R. § 1.415.

<sup>2</sup> See DA 99-950, Order, (rel. May 19, 1999). (Extending deadlines to file comments and reply comments in this proceeding to August 2, 1999, and September 16, 1999, respectively.)

<sup>3</sup> WT Docket No. 99-87, Notice of Proposed Rule Making, (FCC 99-52), (rel. March 25, 1999), 64 Fed. Reg. 23571 ("Notice").

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## **I. Background and Preliminary Statement**

AAR is a voluntary, non-profit organization composed of Class I member railroad companies operating in the United States, Canada and Mexico. AAR is the joint representative and agent of these railroads in connection with federal regulatory matters of common concern to the industry as a whole, including matters pertaining to regulation of communications. In addition, AAR functions as the frequency coordinator with respect to operation of land mobile and other radio-based services. Accordingly AAR has a significant interest in the outcome of this proceeding to implement amendments to the Communications Act of 1934, as Amended ("the Act").

Given the scope of the Commission's inquiry, and the broad applicability of the rules proposed in this proceeding, AAR has worked extensively with other representatives of the land mobile radio community to develop industry consensus positions to the issues raised in this Notice. To that end, AAR has contributed to, and hereby expressly supports the comments being filed in this proceeding by the Critical Infrastructure Industries ("CII") and the Land Mobile Communications Council ("LMCC"). The comments filed by the CII represent the joint statement of the Railroad, Petroleum, and Utility industries, regarding the exemption of these services from the Commission's auction authority. The comments filed by the LMCC include broader statements regarding appropriate licensing methods for non-commercial radio services, as well as the Commission's obligation to avoid mutual exclusivity wherever possible. AAR will not restate all of these arguments here, but rather takes this opportunity to comment on certain issues raised in the Notice of particular relevance and concern to the railroad industry.

**II. Railroad Radio Spectrum Provides a Critical Safety Service and Clearly Falls Within the Exemption from Auction Under Section 309(j)(2).**

Based on the plain statutory language of Section 309(j)(2), clear statements of Congressional intent, and repeated findings of fact by the Commission, there can be no other reasonable outcome than a finding that railroad radio service spectrum remains exempt from the Commission's auction authority.

Under Section 309(j)(2), in order for a private internal radio service to be exempt from the Commission's competitive bidding authority, it must: be used for the protection of life, health, or property; and, may not be made commercially available to the public.<sup>4</sup> The railroad radio services clearly meet this two part test, and therefore are exempt from competitive bidding.

As the Commission is aware, the railroad industry makes extensive use of land mobile radio systems and fixed service ("FS") microwave links for the operation and control of train movements.<sup>5</sup> The North American railroad industry deploys and

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<sup>4</sup> The full text of Section 309(j)(2), 47 U.S.C. § 309(j)(2), is as follows:  
(2) EXEMPTIONS – The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission –

(A) for public safety radio services, including private internal radio services used by state and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that, –  
(i) are used to protect the safety of life, health, or property; and  
(ii) are not made commercially available to the public.

<sup>5</sup> See e.g., Comments of Association of American Railroads in ET Docket No. 95-18, RM-7927, filed March 5, 1995; Railroads' Comments in Response to SkyBridge Application (11 GHz Band), filed December 15, 1997.

depends upon a comprehensive and sophisticated communications network to carry voice and data traffic which is integral to the minute-to-minute management and control of train movements throughout the rail network.<sup>6</sup> As shown schematically on the diagram attached as Attachment A, a combination of FS links and mobile radio channels are used for transmitting voice and data communications to and from crews in locomotives and for controlling and monitoring rail switches and signals. This vital communications network is used to interconnect the trackside radio facilities (both mobile and fixed) with the centralized dispatching center in each railroad's operating region. For example, a locomotive traveling on Union Pacific's right-of-way in Nevada is in contact, via mobile radio and FS links, with the Union Pacific centralized dispatch and control center located hundreds of miles away in Omaha, Nebraska; similarly, Jacksonville, Florida is the center of operations for trains on the CSX network, which covers the Southeast, Mid-central and Middle Atlantic regions of the nation.

Radio communications between trains and central dispatchers are essential to protect railroad employees and the general public. Only radio can provide immediate information on the location, direction and speed of hundreds of trains operating at the same time on each major railroad in the country. This information is indispensable to railroad safety. In this regard, a 1994 "Report to Congress" by the Federal Railroad Administration reviewed in detail the various types of railroad communications systems, including those used for train movement and control, switching operations, defect

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<sup>6</sup> See AAR's Comments in ET Docket No. 95-18, filed May 5, 1995; AAR's Reply Comments filed June 21, 1995; and AAR's Response to Comsat's Supplemental Comments filed May 17, 1996.

detection and emergency response, and concluded that radio communications were an integral part of railroad safety planning and execution.<sup>7</sup>

These operational and safety uses of the railroad radio systems are absolutely critical to the safe operation of railroads; and the communications capacity of these systems is not made available to the public. Accordingly, by application of Section 309(j)(2) railroad radio services are exempt from the Commission's competitive bidding authority. This conclusion is shared by the House and Senate Balanced Budget Act conferees that drafted Section 309(j)(2), who stated:

[T]he exemption from competitive bidding authority for 'public safety radio services' includes 'private internal radio services' used by . . . railroads. . . Though private in nature, the services offered by these entities protect the safety of life, health, or property and are not made commercially available to the public.<sup>8</sup>

It is hard to imagine a clearer statement of congressional intent than this concise statement by the Budget Act conferees confirming the application of the auction exemption to the railroad radio services. The Commission should accept the guidance of Congress in this regard, and affirmatively exempt the railroad industry's communications licenses from the Commission's auction authority.

### **III. The Commission Should Not Unnecessarily Restrict the Use of Auction-Exempt Services.**

In the Notice, the Commission seeks comment on whether regulatory provisions should be adopted to ensure that auction-exempt services are used only for purposes

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<sup>7</sup> Railroad Communications and Train Control, Federal Railroad Administration, Department of Transportation Report to Congress, July 1994 at 22-34 (hereafter FRA Report).

<sup>8</sup> H.R. Conf. Rep. No. 105-217, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 572.

that meet the requirements for exemption from auction.<sup>9</sup> From AAR's perspective, any overly restrictive limits placed on services that are used to protect the safety of life, health, and property, would jeopardize the vital safety component of these services. For example, the vital safety role played by the railroad radio network is largely preventative in nature, rather than responsive. Routine communications carried on the railroad radio network ensure the safe operation of the rail network in order to prevent malfunctions and accidents, rather than to respond to accidents that have already taken place (although in the event that an accident does occur, the rail industry's communications network is a vital part of the response effort). If these routine communications had to be curtailed in order to comply with overly strict service rules for auction-exempt services, the safety function of these services would be significantly reduced. Clearly this is not the outcome intended by Congress in its amendments to Section 309(j)(2) of the Communications Act.

The Commission has already recognized that there is a level of immediacy in the needs of railroad communications systems that provides a tangible safety function: "The nature of [railroads] day-to-day operations provides little or no margin for error and in emergencies they can take on an almost quasi-public safety function. Any failure in their ability to communicate by radio could have severe consequences on the public welfare."<sup>10</sup> Thus the Commission has explicitly acknowledged the accident prevention component of the day-to-day operations of railroad radio communications. While these

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<sup>9</sup> See Notice, at ¶ 43.

<sup>10</sup> Second Report and Order, PR Docket No. 92-235, 12 FCC Rcd 14307 at ¶ 41 (1997)

routine communications may not be in direct response to a public safety crisis, they play an integral role in the safe operation of the rail system and prevention of such crises. Accordingly, this day-to-day use complies with the plain statutory language of Section 309(j)(2), and express Congressional intent as set forth in the Conference report.<sup>11</sup>

**IV. By Continuing to License Railroad Radio Spectrum on a Site-by-Site Basis, the Commission Can Fulfill its Obligation to Avoid Mutual Exclusivity.**

Although the amendments to Section 309(j) may have limited the class of applicants that are inherently exempt from the Commission's auction authority, the new language highlights the Commission's obligations under Section 309(j)(6)(E) of the Act, which states that nothing in the statute "should be construed to relieve the Commission of its obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity."<sup>12</sup>

As the Commission has noted, "the traditional approach to the licensing of users of private spectrum generally does not result in the filing of mutually exclusive applications."<sup>13</sup> In the case of railroads, this traditional licensing approach consists of co-ordinated, site-by-site licenses issued on a first-come, first-served basis. The Commission also correctly notes that site-by-site licenses are appropriate for railroad systems, because of the railroads' need "to cover long but narrow areas rather than the

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<sup>11</sup> See Note 8, supra.

<sup>12</sup> 47 U.S.C. § 309(j)(6)(E).

<sup>13</sup> Notice, at ¶ 13.

wider areas that ordinarily constitute geographic licensing regions.”<sup>14</sup> In fact, so successful has this co-ordinated, site-by-site licensing scheme been in avoiding mutual exclusivity, that AAR, in its capacity as frequency co-ordinator, has never had to submit mutually exclusive railroad applications to the Commission for resolution. If the Commission were to now adopt an alternative licensing scheme that produced mutually exclusive applications, it would be clearly violating the spirit if not the letter of its obligations under Section 309(j)(6)(E).

In the past, when analyzing the implications of Section 309(j)(6)(E), the Commission has interpreted its obligation to avoid mutual exclusivity to be limited by its concurrent obligation under Section 309(j)(3) to design a competitive bidding methodology that serves the public interest.<sup>15</sup> However, because Section 309(j)(3) is only applicable after the Commission determines that an auction is appropriate, and Section 309(j)(6)(E) imposes an obligation to avoid an auction in the first place, such tempering of Section with 309(j)(6)(E) with Section 309(j)(3) is inappropriate in the situation at hand.

Under a proper reading of Section 309(j), *in toto*, the Commission’s first obligation under Section 309(j)(1) (referencing Section 309(j)(6)(E)) is to use all appropriate methods to avoid mutual exclusivity. Only then, if mutual exclusivity cannot reasonably be avoided and the licensee in question is not exempt under Section 309(j)(2), may the Commission design a system of competitive bidding that serves the

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<sup>14</sup> Id.

<sup>15</sup> Notice, at note 174, citing PR Docket 93-144, Second Report and Order, 12 FCC Rcd., 19079.



public interest under Section 309(j)(3). Applying this analysis of Section 309(j) to the spectrum used by the railroad industry, the Commission should preserve the existing site-by-site coordinated licensing scheme, which, as illustrated above, is demonstrably effective in avoiding mutual exclusivity, thereby obviating the need to consider a competitive bidding methodology.

**V. Conclusion**

In adopting rules implementing amendments to the Commission's auction authority as proposed in this proceeding, the Commission must consider very carefully the impact of its rules on the diverse private radio community, especially with respect to those services operating in safety-critical businesses such as the railroad industry. Accordingly, AAR urges the Commission to act in accordance with the recommendations set forth above.

Respectfully submitted,

ASSOCIATION OF AMERICAN RAILROADS

By:   
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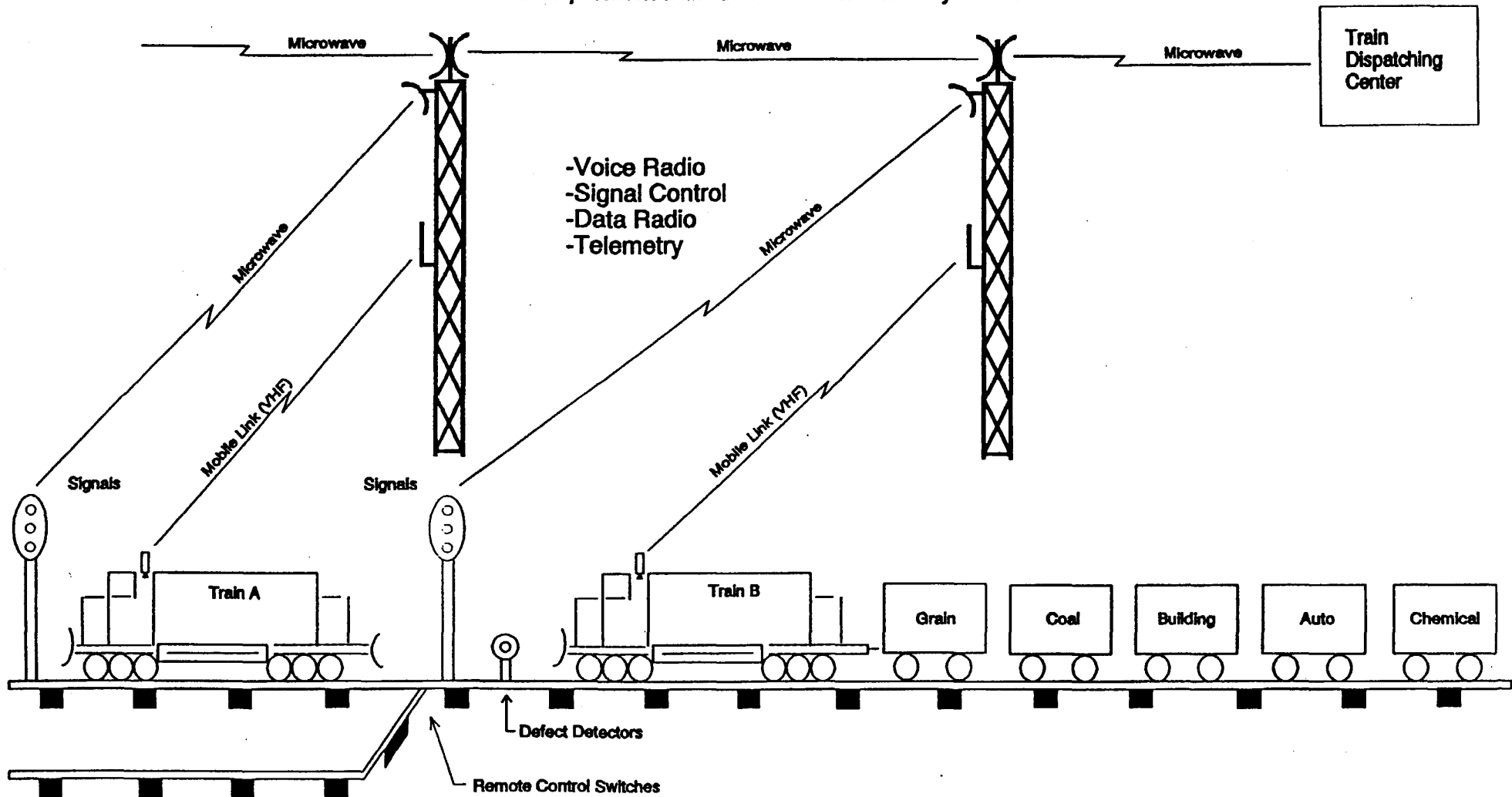
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Date: August 2, 1999

## **ATTACHMENT A**

# Railroad Radio Systems

-are essential for safe, reliable, efficient rail transportation to interconnect train control systems.



Public safety is dependent on safe transportation.

Railroad freight transportation is critical to U.S. economy.

## Certificate of Service

I, Helene McGrath, of the law firm of Verner, Liipfert, Bernhard, McPherson and Hand, hereby certify that a copy of the foregoing was served this 2nd day of August, 1999, via first class mail, postage prepaid, upon the following:

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